Filed 3/18/19 Valdez v. Superior Court CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DANNY VALDEZ, Petitioner, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; MOUNTAIN VALLEY EXPRESS CO., INC., Real Party in Interest.	E070656 (Super.Ct.No. CIVDS1800542) OPINION

ORIGINAL PROCEEDINGS; petition for extraordinary writ. David Cohn, Judge. Petition granted.

Diversity Law Group, Larry W. Lee; David Lee Law, David Lee; Law Offices of Choi & Associates and Edward W. Choi, for Petitioner.

No appearance for Respondent.

Andrews Lagasse Branch + Bell, Michael J. O'Connor, Jr., and Sarkis A. Atoyan, for Real Party in Interest.

In this employment dispute, petitioner Danny Valdez challenges the trial court's order granting arbitration of his individual claims and staying his representative claim during the pendency of that proceeding. We have determined that a writ of mandate must be granted.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Real party in interest Mountain Valley Express Co., Inc. (Mountain Valley) is in the business of overnight and same day interstate freight service. Valdez worked for Mountain Valley as a yard hosteler from June 2016 through July 2017.

On the day he was hired, Valdez signed "Mountain Valley Express Company's Alternative Dispute Resolution Policy and Procedures," which is governed by the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.). The agreement aims to cover "any dispute arising out of or related to Employee's employment with [Mountain Valley], or termination of employment that otherwise would be resolved in a court of law" to the fullest extent possible. Paragraph 2 sets forth the "Scope of the Policy" and delineates which claims are covered and excluded. Within this paragraph, the agreement specifies: "Private attorney general actions are not covered by this Policy, but may be maintained in a court of competent jurisdiction."

Later, in paragraph 3(c), in a section styled "Arbitration Procedures," the agreement provides in part: "[T]here will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action, or in a representative or private attorney general capacity on behalf of a class of persons or the general public. Notwithstanding any other clause contained in this Policy, the preceding sentence shall not be severable from this Policy in any case in which the dispute to be arbitrated is brought as a class or collective action or in a representative or private attorney general capacity on behalf of a class of persons or the general public." In paragraph 6, the agreement contains this general severability clause: "Except as stated in paragraph 3(c), above, in the event any portion of this Policy is deemed invalid, the remainder of this Policy will be enforceable."

In January 2018, Valdez filed a class action complaint, alleging that Mountain Valley failed to properly compensate non-exempt employees for overtime, failed to provide non-exempt employees itemized wage statements, and engaged in unlawful business practices. In addition to these class claims, the complaint included the same individual claims and a representative claim under the Labor Code Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.). Valdez sought restitution under the unfair competition law (Bus. & Prof. Code, § 17200 et seq.), damages (Lab. Code, § 226), and civil penalties under PAGA.

Mountain Valley moved to compel arbitration of the individual claims, dismiss all purported class claims, and to stay the PAGA claim pending resolution of the arbitration

proceeding. Valdez opposed, arguing that the entire agreement was unenforceable because of the PAGA waiver contained in paragraph 3(c). Finding the agreement enforceable, the trial court concluded that the parties could not have intended to waive PAGA claims because the language contained in the "Scope of the Policy" indicated a clear intent to have them litigated in court. The trial court granted the motion to arbitrate all individual claims and stayed the PAGA action pending resolution of the arbitration proceeding.[1]

A month later, Valdez filed this petition for writ of mandate, which Mountain Valley preliminarily opposed. We invited Mountain Valley to file an informal response, which it did, and then we issued an order to show cause. Mountain Valley chose to have its informal response serve as the formal response.

II.

DISCUSSION

Valdez challenges the enforceability of the arbitration agreement. He contends that the entire agreement is unenforceable due to the PAGA waiver provision contained in paragraph 3(c) and its attendant nonseverability clause. We agree.

---

[1] The class claims were not referenced in the hearing or the minute order, nor do the parties mention them, so it is unclear what happened to them. However, Mountain Valley moved to dismiss them based on the class action waiver contained in the agreement and the motion was granted, so we assume they were dismissed. Class action waivers in employment arbitration agreements are enforceable under the FAA. (*Epic Systems Corp. v. Lewis* (2018) __ U.S. __, [138 S.Ct. 1612, 1619, 1623, 200 L.Ed.2d 889] (*Epic Systems*).)

A. Writ Review Is Appropriate

Orders compelling arbitration are interlocutory and not appealable. (*International Film Investors v. Arbitration Tribunal of Directors Guild* (1984) 152 Cal.App.3d 699, 703; cf. Code Civ. Proc., § 1294, subd. (a) [orders denying arbitration are appealable].) "The preferred procedure is to proceed by arbitration and attack confirmation on appeal." (*Atlas Plastering, Inc. v. Superior Court* (1977) 72 Cal.App.3d 63, 67 (*Atlas*).)

While writ relief is rarely warranted, writ review of orders compelling arbitration is appropriate in two circumstances: (1) "if the matters ordered arbitrated fall clearly outside the scope of the arbitration agreement"; or, (2) the arbitration appears unduly time consuming or expensive. (*Zembsch v. Superior Court* (2006) 146 Cal.App.4th 153, 160 (*Zembsch*); see *Atlas*, *supra*, 72 Cal.App.3d at pp. 67-68.) Mountain Valley argues that writ relief is not appropriate here because petitioner has not demonstrated the presence of both of these factors. Both factors, however, need not exist. *Zembsch* and *Atlas* both used the disjunctive word "or" instead of the conjunctive word "and" to connect the two factors, meaning, of course, that the presence of either factor alone is sufficient. (*Houge v. Ford* (1955) 44 Cal.2d 706, 712 ["In its ordinary sense, the function of the word 'or' is to mark an alternative such as 'either this or that.' "].) We agree with this articulation of the test. The presence of either factor is sufficient to warrant writ review of an order compelling arbitration.

As it happens, both conditions are present here. Review by writ of mandate is appropriate because, as discussed in detail *post*, we conclude that the matters ordered

arbitrated are not within the scope of an enforceable arbitration agreement. (*Zembsch*, *supra*, 146 Cal.App.4th at p. 161.) Although Valdez does not assert that arbitration would be too costly or inefficient, it necessarily follows that arbitration of *any* claims "compelled in the absence of a valid, enforceable arbitration agreement is an unduly time consuming and expensive proposition." (*Medeiros v. Superior Court* (2007) 146 Cal.App.4th 1008, 1014, fn. 7 (*Medeiros*); see *Zembsch*, at p. 161.) Writ review "avoid[s] having [the] parties try a case in a forum where they do not belong, only to have to do it all over again in the appropriate forum."[2] (*Medeiros*, at p. 1014, fn. 7.)

Having concluded that writ review is appropriate, we move on to the merits.[3]

B. Standard of Review

Neither party directly addresses the applicable standard of review. They, however, each apply different standards of review. Valdez contends the trial court abused its

---

[2] Since we have concluded that writ review is appropriate, we need not address Mountain View's argument that appellate review is not appropriate under the "death knell" doctrine. We, however, note that the death knell doctrine is inapplicable here since the PAGA claim survived. (*Nguyen v. Applied Medical Resources Corp.* (2016) 4 Cal.App.5th 232, 243-244.)

[3] Valdez did not include in the record, as he must, the minute order granting the motion or, in the alternative, a declaration explaining why the document was not available. (See Cal. Rules of Court, rules 8.486(b)(1)(A) & (b)(2).) The order, however, is readily available through the online docket for the superior court and tracks the oral ruling. We exercise our discretion to take judicial notice of the order on our own motion. (Evid. Code, §§452, subd. (d), 459; *Judge v. Nijjar Realty, Inc.* (2014) 232 Cal.App.4th 619, 623 fn. 3, 626 fn. 5.) While the petition may be summarily denied for failure to comply with the court rules, we choose to exercise our discretion and review the adequacy of the petition on the merits. (See *Small v. Superior Court* (2007) 148 Cal.App.4th 222, 229.)

discretion, and Mountain Valley argues that substantial evidence supports the trial court's decision. Both parties apply the wrong standard.

We review the trial court's interpretation of an arbitration agreement de novo when, as here, no extrinsic evidence was introduced to interpret the agreement. (*Rodriquez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1117.)

C. The Entire Arbitration Agreement Is Unenforceable Because the PAGA Waiver Is Unenforceable and Cannot Be Severed

Arbitration is a matter of contract. (*American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. 228, 233.) The FAA establishes a liberal federal policy favoring arbitration agreements. (*Epic Systems, supra,* 138 S.Ct. at p. 1621.) Arbitration agreements must be rigorously enforced according to their terms. (*Ibid.*) The savings clause prescribes that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" (9 U.S.C. § 2), such as " 'generally applicable contract defenses,' " like " 'fraud, duress, or unconscionability' " (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339 (*Concepcion*)). In other words, the FAA "offers no refuge for 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.' " (*Epic Systems*, at p. 1622.)

Ordinary state law principles of contract interpretation generally apply in interpreting arbitration agreements under the FAA. (*Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 685; *Iskanian v. CLS Transportation Los Angeles* (2014)

59 Cal.4th 348, 376 (*Iskanian*).) "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." (Civ. Code, § 1643; see *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 953-954.) The parties' intent may be derived, if possible, solely in the contract's written provisions. (*Securitas, supra*, 234 Cal.App.4th at p. 1125.) "Contradictory or inconsistent provisions of a contract are to be reconciled by interpreting the language in such a manner that will give effect to the entire contract." (*Estate of Petersen* (1994) 28 Cal.App.4th 1742, 1753, fn. 4; see Civ. Code, § 1652.) Ambiguities in the agreement should be construed against the drafter. (Civ. Code, § 1654; *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 248.)

At the outset, we note that the agreement contains a delegation provision. A "delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." (*Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 68 (*Rent-A-Center*).) In the Scope of the Policy section, the parties agreed that an arbitrator should resolve any "disputes arising out of or relating to interpretation or application of this Policy, including the enforceability, revocability or validity of the Policy or any portion of the Policy." Neither party argued in the trial court or to us that the trial court was not the proper forum to decide the gateway question of arbitrability or that the provision was invalid. (*Rent-A-Center*, at pp. 68-69.). Given the parties' failure to acknowledge the delegation provision, we deem the argument waived. (See *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 [" ' "When an appellant fails

to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." ' [Citation.] 'We are not bound to develop appellants' arguments for them.' "]; see *Avalos v. Perez* (2011) 196 Cal.App.4th 773, 776 ["As a general rule, a claim of error will be deemed to have been forfeited when a party fails to bring the error to the trial court's attention by timely motion or objection."].)

Valdez urges us to reverse the trial court's order because the trial court failed to follow *Securitas*, which he argues controlled because the arbitration agreement at dispute here purportedly is identical to the one disputed there. Valdez also implies that *Securitas* is controlling on appeal. *Securitas* was not decided by "this court," as suggested by Valdez but, rather, was decided by Division Three of this district. Strictly speaking, we are not obliged to follow *Securitas* because there is no horizontal stare decisis in the California Court of Appeal. (*Sarti v. Salt Creek Ltd.* (2008) 167 Cal.App.4th 1187, 1193.)

That said, we turn to *Securitas* now. *Securitas* rests on *Iskanian*, *supra*, 59 Cal.4th 348, 382-383, in which our Supreme Court concluded that a contractual provision completely waiving an employee's right to bring a PAGA action is unenforceable as a matter of law. *Iskanian* further held that the FAA did not have a preemptive effect on PAGA claims. (*Iskanian*, at pp. 387-388.) Applying *Iskanian*, the court in *Securitas* concluded that an arbitration agreement governed by the California Arbitration Act was unenforceable because of a nonseverability provision applicable specifically and exclusively to the unenforceable PAGA waiver provision. (*Securitas*, *supra*, 234

Cal.App.4th at pp. 1122, 1126.) While the waiver and nonseverability clauses at issue here are nearly identical to those contained in the agreement in *Securitas*, as Mountain Valley correctly points out, there is a key distinction between the agreements. The agreement in *Securitas* did not contain a separate and distinct provision allowing PAGA claims to proceed in court.

Because this agreement contains two provisions disparately treating PAGA claims, the parties do not agree whether their agreement contains a waiver of such claims in the first instance. The contested sentence reads: "[T]here will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action, or in a representative or private attorney general capacity on behalf of a class of persons or the general public." While Valdez contends this constitutes a waiver, Mountain Valley foregoes providing an interpretation of this language and instead contends the other provision reflects the intent of the parties to allow PAGA claims to be brought in court and thus trumps this secondary provision. Standing alone, this provision does not allow employees to pursue actions as private attorneys general in *any* forum, which, absent the agreement, they otherwise would have the right to pursue. The provision thus operates as a quintessential waiver of any such claims. (See *Outboard Marine Corp. v. Superior Court* (1975) 52 Cal.App.3d 30, 41, superseded by statute on other grounds as stated in *Flores v. Southcoast Automotive Liquidators, Inc.* (2017) 17 Cal.App.5th 841, 851 ["Waiver is the voluntary relinquishment of a known right."].) Other Courts of Appeal have interpreted similar language in arbitration agreements as waivers. (See *Juarez v.*

Wash Depot Holdings, Inc. (2018) 24 Cal.App.5th 1197, 1200 [PAGA waiver language: " 'There will be no right or authority for any dispute to be brought, heard or arbitrated as a private attorney general action.' "]; *Montano v. Wet Seal Retail, Inc.* (2015) 7 Cal.App.5th 1248, 1258 [PAGA waiver language: "The parties also waive their right to join or consolidate claims with others or to make claims with others as a representative or a member of a class or as a private attorney general."]; *Securitas, supra*, 234 Cal.App.4th at p. 1114 [PAGA waiver language: " '[T]here will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective or representative action ("Class Action Waiver")." "].)

Applying *Iskanian*, we conclude that the PAGA waiver provision in Mountain Valley's arbitration agreement is unenforceable. (*Iskanian*, *supra*, 59 Cal.4th at p. 383.) For that reason alone, the waiver provision must be stricken. As we demonstrate, the waiver also must be stricken applying ordinary principles of contract law.

Despite the initial carve-out contained in paragraph 2 allowing private attorney general claims to proceed in court, as detailed *ante*, private attorney general actions are outright forbidden in paragraph 3(c). Since the exclusion in paragraph 2 comports with *Iskanian*'s proscription against provisions waiving PAGA claims, it seems plausible that the provision was added after *Iskanian* to comply with the new ruling. The latter waiver of PAGA claims also should have been deleted to effectuate the intended result. Instead, the waiver was left in the agreement, directly contradicting the presumably more recent

provision by prohibiting PAGA claims from being brought in any forum, including a court of law.

These conflicting provisions can be harmonized by applying the well-established rule that where two clauses of a contract cannot be reconciled, the first shall be received and the latter rejected. (*Estate of Cox* (1970) 8 Cal.App.3d 168, 199, citing *Burns v. Peters* (1936) 5 Cal.2d 619, 623.) Applying this rule, the first provision stands and the PAGA waiver is rejected. This construction is reinforced by the principle that employment agreements should be construed against employers. (*Sandquist, supra*, 1 Cal.5th at p. 248.) Mountain Valley is arguing in favor of the provision allowing PAGA claims to proceed in court in this instance because the alternative is striking the entire agreement. A provision permitting an employee's claims to proceed in any forum in general disfavors employers when compared to a provision forbidding them from being brought at all. Thus, applying principles of contract law applicable to any contract, the secondary provision must be stricken.

By the express terms of the agreement, the PAGA waiver provision cannot be stricken while leaving the rest of the agreement intact. The waiver is accompanied by a nonseverability provision, which reads: "Notwithstanding any other clause contained in this Policy, the preceding sentence shall not be severable from this Policy in any case in which the dispute to be arbitrated is brought as a class or collective action or in a representative or private attorney general capacity on behalf of a class of persons or the general public." Other invalid provisions are expressly made severable by the express

terms of a general severability provision, which reads: "Except as stated in paragraph 3(c), above, in the event any portion of this Policy is deemed invalid, the remainder of this Policy will be enforceable." The general severability provision thus reiterates that the PAGA waiver provision is to be treated differently than other provisions and severed if found invalid.

Striking the contradictory PAGA waiver provision, therefore, is not possible without triggering the agreement's express prohibition *against* severance. "[T]he rule relating to severability of partially illegal contracts is that a contract is severable if the court can, consistent with the intent of the parties, reasonably relate the illegal consideration on one side to some specified or determinable portion of the consideration on the other side." (*Keene v. Harling* (1964) 61 Cal.2d 318, 321; see Civ. Code § 1599.) Here, the two severability provisions reflect a clear and unmistakable intent that the PAGA waiver provision cannot be divided from the rest of the contract. On this point, we agree with and adopt *Securitas*'s analysis. There, the court reasoned that the agreement was "not divisible, but present[ed] an all-or-nothing proposition: when a[n] . . . employee asserts class, collective or representative claims, either the employee forgoes his or her right to arbitrate such claims, or the entire agreement to arbitrate disputes is unenforceable and the parties must resolve their disputes in superior court." (*Securitas*, *supra*, 234 Cal.App.4th at p. 1126.) Applied here, the nonseverability clause expressly applicable to the PAGA waiver provision—whether the waiver's continued inclusion was the result of poor draftsmanship or not—simply cannot be ignored, as the

trial court did. Thus, because the PAGA waiver provision must be stricken, the entire agreement cannot be enforced.

In sum, we conclude the PAGA waiver in the parties' arbitration agreement is unenforceable both under *Iskanian* and as a contradictory, secondary provision in the agreement. Because that provision cannot be severed based on the express terms of the agreement, we conclude that the entire agreement is unenforceable.[4]

III.

DISPOSITION

Let a writ of mandate issue directing the superior court to (1) vacate its May 8, 2018 order that the parties proceed to arbitrate Danny Valdez's individual claims, dismissing the class action claims (we presume), and staying the PAGA claim, and (2) enter a new order denying Mountain Valley Express Co., Inc.'s motion to compel arbitration of plaintiff Danny Valdez's claims.

---

[4] Finally, we reject Mountain View's argument that the agreement must be enforced because it is conscionable, which Valdez does not dispute. To this point, both parties are mistaken. By its very nature, as an employment contract, the agreement is adhesive and thus contains at least a modicum of procedural unconscionability. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1244.) Procedural and substantive unconscionability both must be present for a court to refuse to enforce an agreement due to unconscionability and there is no indication that the agreement is substantively unconscionable. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.) The lack of substantial unconscionability, however, does not render an otherwise unenforceable agreement enforceable. Unconscionability is simply one of many affirmative defenses to enforcement of a contractual agreement or clause. (Civ. Code, § 1670.5.) Conscionability does not operate as a shield against other defenses against enforceability. (See, e.g., *Concepcion*, *supra*, 563 U.S. at p. 339 ["This saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, *or* unconscionability, . . .' " (italics added)].)

Petitioners are directed to prepare and have the writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

The parties are to bear their own costs in this writ proceeding.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
Acting P. J.

We concur:

SLOUGH
J.

FIELDS
J.